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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 758

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 758

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE SUPREME COURT OF THE STATE OF OKLAHOMA TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVIEW AND DETERMINATION, THE CASE OF GRAND RIVER DAM AUTHORITY, PLAINTIFF IN ERROR, VERSUS THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1, DEFENDANT IN ERROR.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is a special proceeding under the statutes of Oklahoma instituted by respondent against petitioner in the District Court of Ottawa County, Oklahoma, in which damages were assessed against petitioner because of injuries to the basement of respondent's school building caused by the percolation of waters from petitioner's dual-purpose water power and flood control reservoir on Grand River, in Oklahoma, while said reservoir was being operated for flood control under the direction of the District Engineer, Corps of Engineers, as the authorized representative of the Secretary of War. By its petition for the appointment of appraisers to assess the damages claimed, respondent asserted that petitioner had acquired lands in the reservoir area up to elevation 750 above mean sea level, but during flood stages on the Neosho and Spring rivers, which converge to form the Grand River in the neighborhood of respondent's property, petitioner had permitted the waters of the reservoir to rise above that elevation (R. 3). To the appraisers' report, petitioner excepted, alleging the issuance, and its acceptance of, a license from the Federal Power Commission to construct and operate its dam and reservoir; the provisions of said license reserving the storage space in said reservoir above elevation 745 for the control of floods and vesting in the Secretary of War the power to control operation of the reservoir above that elevation; that at the time complained of the operation of the reservoir was directed by the District Engineer, as the authorized representative of the Secretary of War; and that such acts as were performed by petitioner's employees in response to the directions of the District Engineer were performed by them as agents of the United States, for which petitioner was not liable (R. 14-17).

Respondent responded to this plea, saying that by storing water to elevation 749.7 at petitioner's dam, the latter knew that a resultant "back-water curve" would result near respondent's property to approximately elevation 752 and that, thereby, lands not acquired by petitioner would be flooded, and asked that the damages be assessed as previously prayed (R. 42-43).

The District Court overruled petitioner's exceptions and rendered judgment (R. 95). The Supreme Court of Oklahoma affirmed (R. 124-130).

The facts are not disputed. Petitioner is a public corporation and State agency, created by the Laws of Oklahoma (Tit. 82, Chapt. 8, O. S. 1941). At the time complained of, the District Engineer had instructed petitioner's hydraulic engineer to hold the water level to elevation 749.7 at the dam gauge (R. 109). Petitioner's hydraulic engineer protested directing attention to the probable back-water curve and consequent overflow above elevation 750 in the upper reaches of the reservoir area, but was told to proceed according to instructions (R. 124). While a part of respondent's school grounds was overflowed, the water which worked the injury here complained of percolated into the basement and well through a loose sub-surface formation (R. 50-51, 57, 78), so that whether or not petitioner had acquired lands or flowage rights up to the surface elevation which the waters reached at Wyandotte the injuries complained of would have resulted. The District Engineer's instructions were implicity followed (R. 84, 85, 124).

Those parts of petitioner's Federal Power license which reserve storage space in the reservoir above elevation 745 exclusively for flood control and give to the Secretary of War, or his authorized representative, control of the

operation of the reservoir above that elevation for that purpose are:

> "Article 12. The Licensee shall acquire all necessary lands, easements, and rights-of-way up to elevation 750; and, without regard to the provisions of Article 13, below, shall raise all railroads affected by the project to such elevation above elevation 755 as may be necessary to provide for operation of the railroads when the reservoir is raised to elevation 755.
>
> "Article 13. The Licensee is hereby authorized to operate the reservoir in such manner as to utilize storage space below elevation 745 for power production purposes but not to utilize any storage space above said elevation 745 for power production purposes except during periods when the reservoir is being operated for the control of floods. The storage capacity between elevations 745 and 755 shall be expressly reserved for the control of floods. The Licensee shall impound flood waters in the storage space between elevation 745 and 755, and release flood waters therefrom, when, as, and in the manner directed by the Secretary of War, or his authorized representative; provided, that the Licensee shall not be required to impound any water above elevation 750 until the United States has acquired the necessary flowage rights above that elevation.
>
> "Article 14. Subject to the provisions of Article 13, the operation of the project by the Licensee, so far as such operation may affect the use, storage, and discharge from storage, of waters, shall at all times be subject to the control of the Secretary of War under such rules and regulations as he may prescribe in the interests of navigation and flood control, and subject to the control of the Commission under such rules and regulations as it may prescribe for the safety of the demand for the protection of life, health, and property." (R. 37).

The District Engineer interpreted petitioner's license to require the impounding of waters to elevation 750 at the

dam gauge, as shown by various telegraphic instructions to that effect (R. 106, 109).

The Federal Power Commission concurred, saying:

> "The Authority is under obligation to provide flood water storage up to elevation 750 at the dam pursuant to the directions of the Corps of Engineers" (R. 100).

II

Statement of Points Relied On By Petitioner.

1. Power to legislate for the control of floods on non-navigable tributaries of navigable waters of the United States is within the scope of Congress' authority under Article I, Section 8, of the Constitution of the United States (*Oklahoma, ex rel. Phillips, v. Guy F. Atkinson Co.*, 313 U. S. 508, 525, 85 L. Ed. 1487, 1500) and, by appropriate measures, Congress has placed the management of flood control in the War Department, under the direction of the Secretary of War. The Federal Power Commission was authorized to include among the conditions of petitioner's Federal Power license, Articles 12, 13 and 14, thereof, and the District Engineer, being designated as the authorized representative of the Secretary of War, by the latter, was authorized to direct operation of petitioner's reservoir above elevation 745. In obeying the District Engineer's directions in operating said reservoir for flood control above that elevation, petitioner and its employees acted as agents of the United States and cannot be held to liability for having carried out those directions.

By the Act of June 22, 1936, c. 688, Sec. 1, 49 Stat. 1570; Tit. 33, Sec. 701a, U. S. C., it is provided in part:

> " * * * flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with the States, their political subdivisions and localities thereof," etc.

"* * * that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood control purposes are in the interest of the general welfare," etc.

"* * * that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits of whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of the people are otherwise adversely affected."

By the same Act (Sec. 2, 49 Stat. 1570; Tit. 33, Sec. 701b, U. S. C.) jurisdiction of control of floods was vested in the War Department, as follows:

"Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers," etc.

The Act of June 28, 1938, c. 795, Sec. 5, 52 Stat. 1223; Tit. 33, Sec. 701b-2, U. S. C., provided:

"In carrying out the purposes of the Act of June 22, 1936 (49 Stat. 1570), as amended and supplemented, the Secretary of War and the Secretary of Agriculture are hereby authorized to cooperate with institutions, organizations, and individuals, and to utilize the services of Federal, State, and other public agencies," etc.

The Federal Power Commission was authorized to include in petitioner's license Articles 12, 13 and 14 thereof by the following provisions of the Federal Power Act:

"* * * Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity

with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in the license. (Act June 10, 1920, c. 285, Sec. 6, 41 Stat. 1067; Act of Aug. 26, 1935, c. 687, Tit. II, Sec. 204, 49 Stat. 841; Tit. 16, Sec. 799 U. S. C.)

"That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes;" etc. (Act June 10, 1920, c. 285, Sec. 10a, 41 Stat. 1068; Act Aug. 26, 1935, c. 687, Tit. II, Sec. 206g, 49 Stat. 842; Tit. 16, Sec. 803a, U. S. C.)

"The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or by the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made by the Secretary of War," etc. (Act June 10, 1920, c. 285, Sec. 18, 41 Stat. 1073; Act August 26, 1935, c. 687, Tit. II, Sec. 209, 49 Stat. 845; Tit. 16, Sec. 811, U. S. C.)"

The Federal Power Commission was further authorized to include in the license:

"Such other conditions not inconsistent with the provisions of this Act as the Commission may require." (Act June 10, 1920, c. 285, Sec. 10g; 41 Stat. 1068; Act Aug. 26, 1935, c. 687, Tit. II, Sec. 206g, 49 Stat. 842; Tit. 16, Sec. 802g, U. S. C.)"

2. The Supreme Court of Oklahoma denied petitioner a right and immunity specially set up under the Constitution and laws of the United States and an authority exercised

thereunder in holding it liable for damages to respondent's property for having accepted the conditions of the Federal Power license regarding flood control operations and in having built the dam authorized thereby.

3. The Supreme Court of Oklahoma erroneously held that the Act of the Legislature of Oklahoma creating the petitioner, as an agency of the State (Tit. 82, Sec. 861, O. S. 1941), imposed a liability upon petitioner for the injury to respondent directly resulting from petitioner's obedience to the directions of the District Engineer in controlling floods when the reservoir reached a stage above elevation 745, under the authority and requirements of petitioner's Federal Power license, contrary to the laws of the United States enacted pursuant to Article I, Section 8, of the Constitution of the United States.

The part of the State Act involved is:

> "Provided said District shall be liable for all damage caused by said District, its agents, servants and employees in creating, constructing, maintaining or operating said District to any corporation, partnership, person or individual whose property, either real or personal, within or without said District, has been damaged and said damages may be determined by appropriate action in the same manner as provided by law under the Conservancy Act of the State of Oklahoma."

4. The Supreme Court of Oklahoma erroneously denied an immunity vouchsafed to petitioner under the Constitution and Laws of the United States specially claimed in holding that by complying with the conditions of its Federal Power license, it committed a wrong for which it was liable to respondent.

5. Neither Section 10c of the Federal Power Act (Act June 10, 1920, c. 285, Sec. 10c, 41 Stat. 1068; Act Aug. 26,

1935, c. 687, Tit. II, Sec. 206, 49 Stat. 842; Tit. 16, Sec. 802c, U. S. C.) nor Article 17 of the petitioner's license, requiring petitioner to discharge all liability for damages resulting from the operation of the project, created a liability in petitioner for damages caused by its operation of the reservoir for flood control purposes under the direction of the District Engineer.

III.

Grounds for Believing That the Questions Presented Are Substantial and That the Writ Prayed for Should Be Granted.

1. The decision of the Supreme Court of Oklahoma is opposed to the decisions of the Supreme Court of the United States in *United States* v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539; *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 84 L. Ed. 554, and cases therein cited, and to the decisions of the Supreme Courts of Kentucky, Tennessee and Missouri upon the subject of petitioner's immunity from liability herein as an agency of the United States.

2. The development of flood control means, in conjunction with water-power projects, having become a policy of the National Government, and operations for the control of floods being most logically subject to management and coordination by the War Department, the builders of such projects should know definitely the extent of their personal responsibility in accepting licenses providing for the control of floods under the exclusive direction of the Secretary of War and whether in carrying out that direction they are to be held liable for consequential injuries to the lands of others.

3. The questions presented bear importantly upon the future operation of petitioner's project as regards rate structure for electric energy, for if it is responsible in dam-

ages resulting from flood control operations, under competent Federal authority, appropriate reserves must be created to liquidate potential liabilities arising from this source.

4. It is believed that these questions are substantial and ought to be considered for the reasons which impelled the granting of writs of certiorari in *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U. S. 369, 374, 74 L. Ed. 483, 487, and *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 20, 84 L. Ed. 554, 556.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Oklahoma charging said court to certify and send this Court a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Oklahoma had in the case numbered and entitled on its docket, No. 31,226, Grand River Dam Authority, a public corporation, plaintiff in error, *versus* The Board of Education of the Town of Wyandotte, Oklahoma, Independent School District No. 1, defendant in error, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment of said Supreme Court of the State of Oklahoma be reversed by this Court, and for such relief as to this Court may seem proper.

Copies of the transcript of record in this case in the Supreme Court of the State of Oklahoma are filed herewith in conformity with Rule No. 38 of this Honorable Court.

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